

Avicenna Overseas Corp. v Realamerica Co.

2009 NY Slip Op 31994(U)

August 31, 2009

Supreme Court, New York County

Docket Number: 116092/08

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

AVICENNA OVERSEAS CORP.,

Plaintiff (s),

- v -

REALAMERICA CO.,
Defendant(s)

INDEX NO.

116092/08

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

SEP 01 2009

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated:

August 31, 2009

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

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Supreme Court of the State of New York
County of New York: Part 10

Avicenna Overseas Corp.,

Plaintiff,

Decision/Order

-against-

Index#116092/08
Mot. Seq. #s 002, 003

Realamerica Co.,

Defendant.

SEP 0 1 2009

Recitation, as required by CPLR §2219(a), of the papers considered in the review
of this (these) motion(s):

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NEW YORK

PAPERS	NUMBERED
Motion Seq. # 002	
BG emergency affirm., OSC, BG affirm., exhibits.....	1
Motion Seq. #003	
Notice of Motion, TP affd., exhibits.....	1
Notice of Cross-motion.....	2
DM affd., exhibits, BG affd., exhbits.....	3
TP reply affd.....	4

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Defendant originally brought an Order to Show Cause seeking to permanently stay the arbitration proceedings initiated by plaintiff with the American Arbitration Association ("AAA"). Plaintiff, thereafter, separately moved for summary judgment in its favor. Defendant cross-moved to dismiss the complaint for lack of subject and personal jurisdiction, based upon an exclusive forum clause allegedly agreed to by the parties. In the alternative, defendant sought to stay this action in favor of arbitration. In its reply to the cross-motion, plaintiff consented to staying the action in chief in favor of arbitration. At oral argument, the motion for summary judgment was withdrawn by

plaintiff. The remaining motions (to stay arbitration, to dismiss or to stay this proceeding in favor of arbitration) are interrelated and, therefore, they are consolidated for consideration and determination in this single decision.

The underlying complaint seeks monetary damages, including interest and reasonable attorneys fees, based upon defendant's alleged failure to repay loans. The answer denies the material allegations of the complaint and sets forth 22 affirmative defenses, which *inter alia*, includes a claim that the parties agreed that all of their disputes arising out of the contracts referenced in the complaint would be adjudicated in Great Britain (Twenty-first affirmative defense).

The parties agree that they entered into two agreements. One agreement is dated July 26, 2005 and the other agreement is dated June 26, 2006. Certain loans were made in connection with those two agreements in the aggregate amount of \$750,000. Each agreement provides that disputes arising under them will be arbitrated in New York City under the rules of the AAA.

On or about August 26, 2006, the parties executed a third document entitled "Memorandum of Understanding" ("MOU"). Defendant contends that the MOU supercedes the two prior agreements. The MOU provides that the courts of England shall have jurisdiction to hear and decide any suit, action, or proceeding, and/or to settle any disputes, which may arise out of or in connection with the MOU. Defendant argues that the exclusive jurisdiction provisions of the MOU control the parties' present dispute over payment of the notes. Plaintiff claims that the MOU is not a binding agreement and that, therefore, the arbitration provisions of the two original agreements control where the parties' disputes will be heard.

The court, however, does not reach the merits of the parties arguments about whether their disputes must be arbitrated in New York or litigated in England, because the Supreme Court of the State of New York does not have jurisdiction over either the defendant or the subject matter of the parties' disputes.

The first claim made by defendant in its cross-motion to dismiss is that this court has no jurisdiction over it or the subject matter of the action. Davis Martin, vice president of the defendant, asserts in his affidavit (and plaintiff does not dispute) that: Defendant is a Delaware Corporation with its principle place of business in Dallas, Texas. It is not registered or authorized to do business in New York, has no offices in New York, does not employ any individuals in New York, does not supply any goods or services to New York and does not transact business in New York.

Plaintiff, itself is a foreign corporation, according to its own complaint. The agreements made between the parties were not made in New York, no promissory note is payable in New York and no funds between the parties were ever transferred or deposited in New York banks and/or other financial institutions.

Plaintiff does not dispute any of these facts as set forth by defendant. In fact it makes no argument that the court does have jurisdiction.

These facts make is clear that the court has neither subject matter jurisdiction over the dispute nor personal jurisdiction over defendant. CPLR § 302; BCL §1314. The Court therefor has no jurisdiction to reach the parties' collateral dispute raised by these motion about where the merits of their underlying dispute should be heard.

Accordingly it is hereby:

attributable to plaintiff's otherwise unidentified information. In opposition, plaintiff has submitted the affidavit of Modzelewski. Modzelewski states the following:

In June 2007, Diance McFaddin, an attorney representing both Colucci and me, filed a motion to unseal the complaint in the *Pervez Qui Tam* Action. We discovered that there had been an Original QT Complaint and also an Amended QT Complaint. On reviewing the Amended QT Complaint, Colucci and I understood immediately that the claims Pervez had added to his original QT Complaint could only have been based upon information provided by [plaintiff] to his attorneys during their handling of the Civil and Criminal Actions. Further, and more importantly, Pervez's added claims were worth far more than the claims reported in the U.S. Attorney's Notice of 30 November 2005.

Modzelewski outlines the information he believes was added to the Original Complaint in the *Qui Tam* Action based upon plaintiff's confidential communications with the Labaton Defendants.

... the amendments to the initial complaint which I am certain originated with [plaintiff] appear in Para 189 (a) through (f). Para 189 is headed: "Defendants have violated the False Claims Act With Respect to: RCCAC, Outliers, Double-Billing, GME, IME and Disproportionate Share."

...

None of these several terms - RCCAC, Outliers, Double-Billing, GME, IME or Disproportionate Share - is fully explained or relied upon in Pervez's original QT Complaint to explain his claims in that document.

While plaintiff's burden on a motion to for summary judgment is far more exacting, at this stage of the litigation, plaintiff must merely allege sufficient facts to support a cause of action. Based upon the allegations contained in the complaint, as well as Modzelewski's affidavit, plaintiff details specific information he disclosed to the Labaton Defendants during the course of their representation of him which the Labaton Defendants subsequently utilized to bolster the amended complaint in the *Qui Tam* Action which greatly increased the value of Pervez's claims and consequent award

Ordered that the motion to permanently stay arbitration (motions seq. # 1) is denied, and it is further

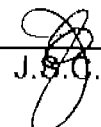
Ordered that the motion for summary judgment (motions seq. # 2) is withdrawn by movant and it is further

Ordered that the cross-motion to dismiss this action for lack of subject matter and personal jurisdiction (motion seq. #2) is granted and the matter is hereby dismissed.

Any requested relief not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, New York
August 31, 2009

So Ordered:



J.G. J.S.C.

FILED
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